SOAH DOCKET NO. 582-08-0990
TCEQ DOCKET NO. 2007-1833-UCR

APPLICATION OF THE CITY OF COLLEGE STATION PURSUANT TO WATER CODE § 13.255(A) TO DECERTIFY A PORTION OF CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 11340 OF WELLBORN SPECIAL UTILITY DISTRICT (APPLICATION NO. 35717-C)	§ § § § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CITY OF COLLEGE STATION'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

COMES NOW, the City of College Station ("City") and files this, its Exceptions to the Proposal for Decision ("PFD") in this case. The Administrative Law Judge ("ALJ") incorrectly decided that this case should be dismissed because the Texas Commission on Environmental Quality ("TCEQ") lacks jurisdiction in this matter. The ALJ's decision is erroneously premised on the notion that the TCEQ will be required to decide common law contract claims in order to determine if there is a valid Texas Water Code § 13.255(a) agreement between the City and Wellborn Special Utility District ("Wellborn SUD").[1] The ALJ goes on to reason that because the Commission does not have authority to determine common law contract claims, the TCEQ does not have jurisdiction to consider and rule on the validity of the agreement, and thus, the City application to incorporate the agreement between the City and Wellborn SUD should be dismissed.

Contrary to the ALJ's position, the City has not presented any common law contract claims for the TCEQ to address and decide and, to the extent that Wellborn SUD raises such

[1] *See* TEX. WATER CODE ANN. § 13.255(a) (Vernon's 2008). *See* Exhibit No. 1. Section 13.255(a) involves the transfer of certificates of convenience and necessity ("CCNs") from certain types of entities to municipalities.

claims during the course of a hearing, the TCEQ should decline to rule on them, because those claims rightly belong in district court. The TCEQ has the authority under section 13.255(a) to incorporate the agreement between the City and Wellborn SUD into the respective certificates of convenience and necessity ("CCNs") of the parties. For this reason, the ALJ's PFD should be rejected, and the TCEQ should order the case back to the State Office of Administrative Hearings ("SOAH") for a hearing about the following:

1. Whether there is a written agreement that has been executed by the parties;

2. Who the parties to the agreement are and whether the agreement is between a municipality and a nonprofit water supply or sewer service corporation, a Texas Water Code Chapter 65 special utility district, a Texas Water Code Chapter 53 fresh water supply district, or a retail public utility operating within the municipal boundaries of a city with a population of 1.7 million or more;

3. Whether the agreement involves service to territory that has been annexed or incorporated by the municipality and whether that territory is located in the service area of the other party to the agreement; and

4. Whether the agreement relates to the provision of service to the annexed or incorporated territory and who will provide service to the annexed or incorporated areas pursuant to the agreement.

Upon verification of these facts, the Commission must incorporate the section 13.255(a) agreement into the respective CCNs of the parties.[2]

[2] *Id.*

I. BACKGROUND

In 1992, the City and Wellborn Water Supply Corporation ("Wellborn WSC") (predecessor in interest to Wellborn Special Utility District) entered into the *Agreement for the Bulk Sale and Purchase of Water* ("1992 Agreement"). The 1992 Agreement obligated the City to furnish water to Wellborn and obligated Wellborn both to pay compensation to the City on a monthly basis for the water furnished to Wellborn and to allow the City to provide water service to areas annexed by the City.[3]

On several occasions after execution of the 1992 Agreement and through 1997, the City annexed service territory of Wellborn and, in 1997, the City and Wellborn sought and received Commission approval to transfer water service area for the previous annexations according to the method set out in the 1992 Agreement.[4] In 1998, Wellborn Water Supply Corporation converted to Wellborn Special Utility District and, by Texas Natural Resource Conservation Commission Order dated March 11, 1998, all of the debts and assets of Wellborn WSC were to be transferred to Wellborn SUD, which occurred on May 5, 1998.[5]

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[3] Paragraph 3 of the 1992 Agreement contains the following language regarding the water service rights of the City, and the contract obligation of Wellborn WSC, upon an annexation by the City:

> The parties understand and agree that as a part of the consideration for the execution of this Agreement WELLBORN agrees to allow CITY to provide the water service to any area annexed by CITY without separate charge. It is the intent of the parties that any prohibition of such transfer of water utility customers upon annexation by City shall result in the automatic termination of this Agreement.

See Exhibit No. 2 (1992 Agreement).

[4] *See* Exhibit No. 3 (1997 Agreement). In a 1997 Agreement between the parties evidencing the transfer, the parties state that the consideration for the transfer is as agreed to pursuant to Paragraph 3 of the 1992 agreement. *See also* Texas Natural Resource Conservation Commission CCN Application No. 31495-C.

[5] *See* Exhibit No. 4 (TNRCC Order dated March 11, 1998).

In January 2000, Wellborn notified the City that effective January 21, 2003 the 1992 Agreement would end.[6] In the notification, Wellborn stated that all provisions of the 1992 Agreement would remain in full force and effect during the remaining three years. Pursuant to the 1992 Agreement and prior to January 2003, the City annexed land located in the certificated service area of Wellborn. When it became clear that Wellborn would not comply with the 1992 Agreement to transfer the newly annexed territory, the City filed a civil suit to enforce the agreement. The City brought before the Brazos District Court claims of breach of contract, promissory estoppel, specific performance, declaratory judgment, and injunctive relief.

Just before the City filed its case in District Court, Wellborn filed a cease and desist action before the TCEQ in an attempt to obtain a ruling from the TCEQ that the provision in the 1992 Agreement relating to the transfer of territory was not valid or enforceable under Section 13.248 of the Texas Water Code and that the provision does not constitute a writing under Section 13.255(a) of the Texas Water Code. In upholding the proposal for decision granting the City's motion for summary disposition, the Commission correctly refused to rule on any of the contract validity questions.[7]

In the District Court case filed by the City, Wellborn argued, among other things, that the TCEQ had original and exclusive jurisdiction over the validity of the 1992 Agreement, and despite the City's arguments to the contrary, the District Court dismissed the City's lawsuit. In 2006, the Waco Court of Appeals, in a split decision, upheld the lower court's dismissal of the City's claims of breach of contract, promissory estoppel, specific performance, declaratory judgment, and injunctive relief on the conclusion that the Commission has exclusive and original

[6] *See* Exhibit No. 5 (January 21, 2000 Letter from Wellborn SUD to the City of College Station).
[7] *See* Exhibit No. 6 (*In re Application of Wellborn SUD for Section 13.252, Texas Water Code Cease and Desist Order*, SOAH Docket No. 582-04-2840).

jurisdiction over the 1992 Agreement.[8] The City appealed this decision to the Texas Supreme Court, but the City's appeal was denied.[9]

While the City argued in those cases that decisions regarding interpretations of the 1992 Agreement should be made by the courts, the City did not prevail, and at the urging of Wellborn, the District Court and the 10th Court of Appeals determined that decisions regarding the 1992 Agreement were within the original and exclusive jurisdiction of the TCEQ, a decision the Supreme Court declined to review. Because the Court of Appeals held that the City must go first to the TCEQ, the City filed its Texas Water Code § 13.255(a) application to transfer territory from Wellborn to the City as provided under the 1992 Agreement.

Now, the Commission must decide what authority it has under section 13.255(a) to address disputes between parties as they relate to the contract filed with the TCEQ under section 13.255(a). The ALJ suggests that the TCEQ has none. The City disagrees.

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[8] *See City of College Station v. Wellborn Special Utility District*, 2006 WL 2067887 (Tex.App.-Waco 2006, pet. denied) (mem. op., not designated for publication) attached hereto as Exhibit No. 7.

[9] *See City of College Station v. Wellborn Special Utility District*, No. 06-0893 (Tex. March 9, 2007), *available at* http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=27689.

II. EXCEPTIONS

A. EXCEPTION NO. 1:

The City takes exception to proposed Conclusions of Law Nos. 2 and 3, and Ordering Provisions Nos. 1 and 2 because:

> **(1) the City's Application before the TCEQ does not seek or request that the TCEQ decide any common law claims with respect to the contract;**
>
> **(2) the TCEQ has authority to interpret and settle disputes over the 1992 Agreement between the City and Wellborn to the limited extent those findings that are reasonably necessary to exercise its non-discretionary authority under Section 13.255(a); and**
>
> **(3) parties to section 13.255(a) contract are not required to seek a judicial decree as to the validity of the contract before filing the contract with the TCEQ as suggested by Conclusion of Law No. 2.**

(1). The City's Application before the TCEQ does not seek or request that the TCEQ decide any common law claims with respect to the contract.

With respect to the TCEQ jurisdiction to decide common law claims, the City agrees that the TCEQ does not have the authority to decide those disputes and the City argued that position to the Waco Court of Appeals. However, in this case, the City has presented no common law claims before the TCEQ or any request for the TCEQ to resolve any common law claims. The City is not seeking damages, an award for attorney's fees, or an injunction. The City has simply presented an application to transfer service territory pursuant to section 13.255(a) and the only determinations that the TCEQ must make are those that articulated in section 13.255(a). *See* Paragraph II.A.(2) below for the discussion concerning the determinations the TCEQ must make under section 13.255(a).

Yet, the ALJ, in his PFD, has predetermined that common law contract claims will be presented and the TCEQ will be forced to resolve them. Wellborn SUD, in its Original Answer,

threw out a myriad of reasons why it believes that the 1992 Agreement is unenforceable. The PFD apparently relies on these bald assertions by Wellborn SUD about what must be determined as proof that the TCEQ must make a decision as to those claims. However, no evidence has been presented to support any of these claims or and there is no evidence that shows the TCEQ must first decide those issues before exercising its authority under section 13.255(a). As noted in the City's Brief on Jurisdictional Issues, the Legislature addressed the concerns raised by Wellborn SUD's when it drafted section 13.255(a). *See* Paragraph IV of the City's Brief on Jurisdictional Issues.

It should also be noted that to the extent one of the parties raises any claims during the course of the hearing that are outside the TCEQ's jurisdiction to decide, the TCEQ, as it does in other contested proceedings, should decline to rule on those matters.

(2) The TCEQ has authority to interpret and settle disputes over the 1992 Agreement between the City and Wellborn to the extent those findings that are reasonably necessary to exercise its non-discretionary authority under Section 13.255(a).

As a general rule, a state administrative agency has "only those powers that the Legislature expressly confers upon it." *See Public Util. Comm'n of Texas v. City of Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001). A state agency may also have implied powers that are reasonably necessary to carry out the express responsibilities given to it by the Legislature. *Id.* The same analysis applies to an agency's authority to resolve contract disputes.

With respect to disputes regarding the validity and enforceability of a contract, district courts have "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases [in which jurisdiction is] conferred . . . on some other court, tribunal, or administrative body. . . .", and there is no presumption that an administrative agency is authorized to resolve disputes. TEX. CONST. art V, § 8; *Blue Cross Blue Shield of Tex. v. Duenez*,

201 S.W.3d 674, 676 (Tex. 2006); *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002). For an administrative agency to have exclusive authority to determine a dispute between private parties, the Legislature must grant the agency such authority. *See Blue Cross Blue Shield*, 201 S.W.3d at 676. This grant of authority must be either a clear and express grant or one that is necessary to fulfill a function or perform a duty placed expressly in the agency by the Legislature. *See Public Util. Comm'n of Texas v. City of Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001); *Tex. Dept. of Human Serv. v. ARA Living Centers of Tex., Inc.*, 833 S.W.2d 689, 694 (Tex.Civ.App.-Austin 1992, writ denied). Whether an agency has jurisdiction to determine disputes depends upon statutory interpretation. *See In re Tex. Mutual Ins. Co.*, 157 S.W.3d 75, 78 (Tex.App.-Austin 2004, no pet.). The courts have ruled in this case that the TCEQ has jurisdiction over the 1992 Agreement. *See City of College Station v. Wellborn Special Utility District*, 2006 WL 2067887 (Tex.App.-Waco 2006, pet. denied) (mem. op., not designated for publication).[10]

The next step is to analyze section 13.255(a) to assess exactly what authority the Legislature has granted the TCEQ over the agreement between the City and Wellborn and TCEQ's authority to evaluate a contract's validity and enforceability. Section 13.255(a) provides:

> In the event that an area is incorporated or annexed by a municipality, . . . the municipality and a retail public utility that provides water or sewer service to all or part of the area pursuant to a certificate of convenience and necessity may agree in writing that all or part of the area may be served by a municipally owned utility, . . . or by the retail public utility. . . . The agreement may provide for single or dual certification of all or part of the area, for the purchase of facilities or property, and for such other or additional terms that the parties may agree on . . . . The executed agreement shall be filed with the commission, and the commission, on receipt of the agreement, shall incorporate

[10] *See*Exhibit No. 7.

the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement.[11]

The TCEQ's discretion under section 13.255(a) is limited. It must incorporate the terms of the Section 13.255(a) agreement into the respective CCNs of the parties. To exercise this limited power, the Commission must be able to verify certain information relating to the contract and the parties in order to ensure that the parties may avail themselves of section 13.255(a) and that the changes to the respective CCNs as contemplated by the agreement can be effectuated.

Specifically, the TCEQ must have authority to decide if the agreement is an agreement under section 13.255(a). Section 13.255(a) requires by implication that the TCEQ determine the following:

1. Whether there is a written agreement that has been executed by the parties;

2. Who the parties to the agreement are and whether the agreement is between a municipality and a nonprofit water supply or sewer service corporation, a Texas Water Code Chapter 65 special utility district, a Texas Water Code Chapter 53 fresh water supply district, or a retail public utility operating within the municipal boundaries of a city with a population of 1.7 million or more;

3. Whether the agreement involves service to territory that has been annexed or incorporated by the municipality and whether that territory is located in the service area of the other party to the agreement; and

4. Whether the agreement relates to the provision of service to the annexed or incorporated territory and who will provide service to the annexed or incorporated areas pursuant to the agreement.

To the extent there is a dispute between the parties are to any of these items, it is within the authority of the TCEQ to resolve the dispute.

[11] TEX. WATER CODE ANN. § 13.255(a).

(3) Parties to section 13.255(a) contract are not required to seek a judicial decree as to the validity of the contract before filing the contract with the TCEQ as suggested by the proposed Conclusion of Law No. 2.

The ALJ's PFD suggests that the 1992 Agreement is not a valid section 13.255(a) agreement because there is a dispute between the parties regarding the contract. The ALJ, in agreeing with the Executive Director's reasoning, claims that there can be no "unsettled common law issues" and, until those issues are decided, the TCEQ has no jurisdiction to exercise its authority under section 13.255(a). There is no support, and none offered by the ED and the ALJ, for this position. Nothing in section 13.255(a) states that, in order for the TCEQ to have jurisdiction over a contract filed pursuant to section 13.255(a), all common law issues must be settled.

In fact, the ED has no way of ensuring that a section 13.255(a) contract, even ones for which there are no disputes between the parties at the time the contract is filed with the TCEQ, will not have unsettled common law issues that arise in the future. Furthermore, Conclusion of Law No. 2 suggests that parties to any section 13.255(a) agreement, whether there is a present dispute over the agreement or not, must first obtain a judicial decree as to the contract validity *before* it is filed with the TCEQ. This cannot be the case and there is not support in section 13.255(a) for this conclusion of law.

The TCEQ has jurisdiction over the parties under section 13.255(a) because the City and Wellborn are the types of entities that may avail themselves of section 13.255 (*i.e.* a city and a special utility district), and the TCEQ has jurisdiction over the 1992 Agreement under section 13.255(a) because the City filed it with the TCEQ pursuant to that provision and the 1992 Agreement involves the transfer of certificated territory inside the city limits from a SUD to a

city. No further inquiry is required to establish jurisdiction over the parties and the subject matter.

B. EXCEPTION NO. 2

The City takes exception to Ordering Provision No. 1 because:

(1) it implies that Wellborn enjoys sovereign immunity from TCEQ actions under section 13.255, which is does not; and

(2) it is the Executive Director's jurisdictional plea contained in his brief that is the basis for the ALJ recommendation to dismiss the City application. Granting Wellborn's Plea confuses the administrative record. While the City does not agree that its application should be dismissed, if the TCEQ dismisses the application, it should be dismissed based on the ED's jurisdictional plea.

(1) Ordering Provision No. 1 could imply that Wellborn has sovereign immunity from section 13.255 actions by the TCEQ, which it does not.

Wellborn's Plea to the Jurisdiction was premised on the claim that Wellborn has sovereign immunity from any action by the TCEQ under section 13.255. *See* Exhibit No. 8 (Wellborn's Plea to the Jurisdiction). Ordering Provision No. 1 grants Wellborn's Plea, and while there are no findings or conclusions that suggest sovereign immunity is the basis for the dismissal, granting the Plea could imply otherwise.

Both the City and the Executive Director argued that Wellborn did not have sovereign immunity from a section 13.255 action before the TCEQ because the Legislature specifically waived any immunity a special utility district may have. TEX. WATER CODE ANN. § 13.255(j)(1). Section 13.255(j) expressly states that the section applies to cases where "the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a nonprofit water supply . . . corporation, [or] a special utility district under Chapter 65, Water Code". TEX. WATER CODE ANN. § 13.255(j)(1). Wellborn is a special utility district operating under Chapter 65 of the Texas Water Code. Moreover, as a retail public utility

operating pursuant to a certificate of convenience and necessity issued by the TCEQ, Wellborn is always subject to the jurisdiction of the TCEQ as it relates to that CCN. *See e.g.* TEX. WATER CODE ANN. §§ 13.241, 13.242, 13.250, 13.252, and 13.254.

Because there are no finding of facts or conclusions of law that support this ordering provision, and because Wellborn does not have sovereign immunity from actions by the TCEQ regarding its CCN, Wellborn's Plea to the Jurisdiction should be dismissed. The City proposes that the following Conclusion of Law be added to the proposed order:

> Section 13.255 specifically waives sovereign immunity of a special utility district from actions by the Commission, and therefore, Wellborn Special Utility District does not enjoy sovereign immunity in this proceeding.

The City also proposes that Ordering Provision No. 1 be amended to state: "Wellborn Special Utility District's Plea to the Jurisdiction is DISMISSED."

(2) While the City does not agree that its application should be dismissed, if the TCEQ dismisses the application, it should be dismissed based on the ED's jurisdictional plea.

It is clear from the PFD and the proposed Order that the basis for the proposed dismissal of the City's application is the argument presented by the Executive Director that the Commission does not have jurisdiction to consider and rule on the validity of agreements. While the Executive Director's Brief on the Scope of Jurisdiction was not titled a "Plea to the Jurisdiction," it was, in fact, a Plea to the Jurisdiction, and not merely a brief in support of Wellborn's Plea.[12] The misnomer of the ED's pleading does not render it ineffective, and the TCEQ may treat the pleading as if it were properly named. *See* TEX. R. CIV. P. 71; *State Bar v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980); *BCY Water Supply Corp. v. Residential Investments, Inc.*, 170 S.W.3d 596, 604 (Tex.App.-Tyler 2005, pet. denied). Because granting Wellborn's

[12] In fact, the ED rejected Wellborn's argument regarding sovereign immunity.

Plea to the Jurisdiction creates confusion in the administrative record, if the TCEQ is to dismiss the City's Application, the TCEQ should add an ordering provision that states: "The ED's jurisdictional plea contained in its Brief on the Scope of Jurisdiction is GRANTED."

C. EXCEPTION NO. 3

The City takes exception to Finding of Fact No. 20 because FOF No. 20 is a misstatement of Wellborn's Plea to the Jurisdiction.

Wellborn filed its Plea to the Jurisdiction on the basis that is enjoyed sovereign immunity from actions by the TCEQ with respect to the 1992 Agreement and not on the basis that there was no valid contract, as stated in Finding of Fact No. 20. *See* Exhibit No. 8. While Wellborn's Original Answer contained claims that suggested it would argue the validity of the 1992 Agreement, but no evidence was ever presented on those claims. It was the Executive Director, however, that argued that the 1992 Agreement could not be considered by the TCEQ because there was an on-going dispute between the parties regarding the contract and if the TCEQ were to proceed with the case, the TCEQ would be required to consider common law contract issues, which the ED claims are outside of the jurisdiction of the TCEQ. Finding of Fact No. 20 should state: "Wellborn filed a Plea to the Jurisdiction requesting dismissal of College Station's application on the basis that it had sovereign immunity."

III. CONCLUSION

The decision about whether the TCEQ has jurisdiction to decide disputes regarding an agreement filed with the Commission under section 13.255(a) is one of first impression and one that should be based on law rather than first reactions. While it is understandable that the TCEQ would not want to be in the middle of a private dispute between two parties, this case is not a private dispute, but rather involves a license issued by the TCEQ (*i.e.* Wellborn's CCN). The

City attempted to obtain judicial resolution of its private disputes with Wellborn, but at Wellborn's urging, the courts declared that the TCEQ had exclusive jurisdiction. Based on that judicial decision, the City filed its application to transfer annexed areas as provided by the 1992 Agreement and, in doing so, limited the relief requested to only that in which the TCEQ has authority to grant under section 13.255(a) – the transfer of the annexed areas as required by the 1992 Agreement.

While it is often easier to simply react by saying "we can't do that," the TCEQ must have some legal basis for such a position. There is no legal basis for the ALJ's recommendation that the TCEQ has no jurisdiction in this case and none is cited in the PFD. However, in examining section 13.255(a), it is clear that the TCEQ has at least some limited authority to interpret agreements between parties and resolves certain disputes that may arise. Specifically, TCEQ has authority to decide if the agreement is an agreement under section 13.255(a). Thus, by implication, the TCEQ has the authority to determine whether there is a written agreement executed by the parties, who the parties are to the agreement are and whether the agreement is between a municipality and a special utility district, whether the agreement involves service to territory that has been annexed or incorporated by the municipality, whether that territory is located in the service area of the other party to the agreement, and whether the agreement relates to the provision of service to the annexed or incorporated territory. To the extent there is a dispute between the parties are to any of these items, it is within the authority of the TCEQ to resolve the dispute.

WHEREFORE PREMISES CONSIDERED, the City respectfully requests that the Commission declare that it has jurisdiction over the City's application, decline to issue the Order proposed by the ALJ, and order the City's application be remanded back to SOAH for further

proceedings to make findings as required by section 13.255(a) and to incorporate the terms of the agreement into the respective CCNs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 27th day of May, 2008, a true and correct copy of the foregoing document was served on the following parties via hand delivery:

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§ 13.255. Single Certification in Incorporated or Annexed Areas

(a) In the event that an area is incorporated or annexed by a municipality, either before or after the effective date of this section, the municipality and a retail public utility that provides water or sewer service to all or part of the area pursuant to a certificate of convenience and necessity may agree in writing that all or part of the area may be served by a municipally owned utility, by a franchised utility, or by the retail public utility. In this section, the phrase "franchised utility" shall mean a retail public utility that has been granted a franchise by a municipality to provide water or sewer service inside municipal boundaries. The agreement may provide for single or dual certification of all or part of the area, for the purchase of facilities or property, and for such other or additional terms that the parties may agree on. If a franchised utility is to serve the area, the franchised utility shall also be a party to the agreement. The executed agreement shall be filed with the commission, and the commission, on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement.

(b) If an agreement is not executed within 180 days after the municipality, in writing, notifies the retail public utility of its intent to provide service to the incorporated or annexed area, and if the municipality desires and intends to provide retail utility service to the area, the municipality, prior to providing service to the area, shall file an application with the commission to grant single certification to the municipally owned water or sewer utility or to a franchised utility. If an application for single certification is filed, the commission shall fix a time and place for a hearing and give notice of the hearing to the municipality and franchised utility, if any, and notice of the application and hearing to the retail public utility.

(c) The commission shall grant single certification to the municipality. The commission shall also determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility, and shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property. If the municipality in its application has requested the transfer of specified property of the retail public utility to the municipality or to a franchised utility, the commission shall also determine in its order the adequate and just compensation to be paid for such property pursuant to the provisions of this section, including an award for damages to property remaining in the ownership of the retail public utility after single certification. The order of the commission shall not be effective to transfer property. A transfer of property may only be obtained under this section by a court judgment rendered pursuant to Subsection (d) or (e) of this section. The grant of single certification by the commission shall go into effect on the date the municipality or franchised utility, as the case may be, pays adequate and just compensation pursuant to court order, or pays an amount into the registry of the court or to the retail public utility under Subsection (f). If the court

judgment provides that the retail public utility is not entitled to any compensation, the grant of single certification shall go into effect when the court judgment becomes final. The municipality or franchised utility must provide to each customer of the retail public utility being acquired an individual written notice within 60 days after the effective date for the transfer specified in the court judgment. The notice must clearly advise the customer of the identity of the new service provider, the reason for the transfer, the rates to be charged by the new service provider, and the effective date of those rates.

(d) In the event the final order of the commission is not appealed within 30 days, the municipality may request the district court of Travis County to enter a judgment consistent with the order of the commission. In such event, the court shall render a judgment that:

(1) transfers to the municipally owned utility or franchised utility title to property to be transferred to the municipally owned utility or franchised utility as delineated by the commission's final order and property determined by the commission to be rendered useless or valueless by the granting of single certification; and

(2) orders payment to the retail public utility of adequate and just compensation for the property as determined by the commission in its final order.

(e) Any party that is aggrieved by a final order of the commission under this section may file an appeal with the district court of Travis County within 30 days after the order becomes final. The hearing in such an appeal before the district court shall be by trial de novo on all issues. After the hearing, if the court determines that the municipally owned utility or franchised utility is entitled to single certification under the provisions of this section, the court shall enter a judgment that:

(1) transfers to the municipally owned utility or franchised utility title to property requested by the municipality to be transferred to the municipally owned utility or franchised utility and located within the singly certificated area and property determined by the court or jury to be rendered useless or valueless by the granting of single certification; and

(2) orders payment in accordance with Subsection (g) of this section to the retail public utility of adequate and just compensation for the property transferred and for the property damaged as determined by the court or jury.

(f) Transfer of property shall be effective on the date the judgment becomes final. However, after the judgment of the court is entered, the municipality or franchised utility may take possession of condemned property pending appeal if the municipality or franchised utility pays the retail public utility or pays into the registry of the court, subject to withdrawal by the retail public utility, the amount, if any, established in the court's judgment as just and adequate compensation. To provide security in the event an appellate court, or the trial court in a new trial or on remand, awards compensation in excess of the original award, the municipality or franchised utility, as the case may be, shall deposit in the registry of the court an additional sum in the amount of the award, or a surety bond in the same amount issued by a surety company

qualified to do business in this state, conditioned to secure the payment of an award of damages in excess of the original award of the trial court. On application by the municipality or franchised utility, the court shall order that funds deposited in the registry of the court be deposited in an interest-bearing account, and that interest accruing prior to withdrawal of the award by the retail public utility be paid to the municipality or to the franchised utility. In the event the municipally owned utility or franchised utility takes possession of property or provides utility service in the singly certificated area pending appeal, and a court in a final judgment in an appeal under this section holds that the grant of single certification was in error, the retail public utility is entitled to seek compensation for any damages sustained by it in accordance with Subsection (g) of this section.

(g) For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Chapter 21, Property Code, governing actions in eminent domain; the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate, shall, at a minimum, include: impact on the existing indebtedness of the retail public utility and its ability to repay that debt, the value of the service facilities of the retail public utility located within the area in question, the amount of any expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area that are allocable to service to the area in question, the amount of the retail public utility's contractual obligations allocable to the area in question, any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the single certification, the impact on future revenues lost from existing customers, necessary and reasonable legal expenses and professional fees, factors relevant to maintaining the current financial integrity of the retail public utility, and other relevant factors.

(g–1) The commission shall adopt rules governing the evaluation of the factors to be considered in determining the monetary compensation under Subsection (g). The commission by rule shall adopt procedures to ensure that the total compensation to be paid to a retail public utility under Subsection (g) is determined not later than the 90th calendar day after the date on which the commission determines that the municipality's application is administratively complete.

(h) A municipality or a franchised utility may dismiss an application for single certification without prejudice at any time before a judgment becomes final provided the municipality or the franchised public utility has not taken physical possession of property of the retail public utility or made payment for such right pursuant to Subsection (f) of this section.

(i) In the event that a municipality files an application for single certification on behalf of a franchised utility, the municipality shall be joined in such application by such franchised utility, and the franchised utility shall make all payments required in the court's judgment to adequately and justly compensate

the retail public utility for any taking or damaging of property and for the transfer of property to such franchised utility.

(j) This section shall apply only in a case where:

(1) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a nonprofit water supply or sewer service corporation, a special utility district under Chapter 65, Water Code, or a fresh water supply district under Chapter 53, Water Code; or

(2) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a retail public utility, other than a nonprofit water supply or sewer service corporation, and whose service area is located entirely within the boundaries of a municipality with a population of 1.7 million or more according to the most recent federal census.

(k) The following conditions apply when a municipality or franchised utility makes an application to acquire the service area or facilities of a retail public utility described in Subsection (j)(2):

(1) the commission or court must determine that the service provided by the retail public utility is substandard or its rates are unreasonable in view of the reasonable expenses of the utility;

(2) if the municipality abandons its application, the court or the commission is authorized to award to the retail public utility its reasonable expenses related to the proceeding hereunder, including attorney fees; and

(3) unless otherwise agreed by the retail public utility, the municipality must take the entire utility property of the retail public utility in a proceeding hereunder.

(*l*) For an area incorporated by a municipality, the compensation provided under Subsection (g) shall be determined by a qualified individual or firm to serve as independent appraiser, who shall be selected by the affected retail public utility, and the costs of the appraiser shall be paid by the municipality. For an area annexed by a municipality, the compensation provided under Subsection (g) shall be determined by a qualified individual or firm to which the municipality and the retail public utility agree to serve as independent appraiser. If the retail public utility and the municipality are unable to agree on a single individual or firm to serve as the independent appraiser before the 11th day after the date the retail public utility or municipality notifies the other party of the impasse, the retail public utility and municipality each shall appoint a qualified individual or firm to serve as independent appraiser. On or before the 10th business day after the date of their appointment, the independent appraisers shall meet to reach an agreed determination of the amount of compensation. If the appraisers are unable to agree on a determination before the 16th business day after the date of their first meeting under this subsection, the retail public utility or municipality may petition the commission or a person the commission designates for the purpose to appoint a third qualified independent appraiser to reconcile the appraisals of the two originally appointed

appraisers. The determination of the third appraiser may not be less than the lesser or more than the greater of the two original appraisals. The costs of the independent appraisers for an annexed area shall be shared equally by the retail public utility and the municipality. The determination of compensation under this subsection is binding on the commission.

(m) The commission shall deny an application for single certification by a municipality that fails to demonstrate compliance with the commission's minimum requirements for public drinking water systems.

Added by Acts 1987, 70th Leg., ch. 583, § 1, eff. Aug. 31, 1987. Amended by Acts 1989, 71st Leg., ch. 567, § 32, eff. Sept. 1, 1989; Acts 1989, 71st Leg., ch. 926, § 1, eff. Aug. 28, 1989; Acts 1995, 74th Leg., ch. 814, §§ 1 to 4, eff. Aug. 28, 1995; Acts 1999, 76th Leg., ch. 1374, § 1, eff. Aug. 30, 1999; Acts 1999, 76th Leg., ch. 1375, § 1, eff. Sept. 1, 1999; Acts 2005, 79th Leg., ch. 1145, § 10, eff. Sept. 1, 2005.

Historical and Statutory Notes

Acts 1989, 71st Leg., ch. 567, § 32, in subsec. (c) inserted "retail public" following "property of a" in the second sentence and added the last two sentences; in subd. (d)(2) inserted "final".

Acts 1989, 71st Leg., ch. 926, § 1, in subsec. (j), substituted "case where: (1) the" for "case where the", in subd. (j)(1) added "; or"; and added subd. (j)(2) and subsec. (k).

Acts 1995, 74th Leg., ch. 814 rewrote subsec. (g); in subsec. (j)(1), inserted "or a special utility district under Chapter 65, Water Code"; and added subsecs. (*l*) and (m).

Acts 1999, 76th Leg., ch. 1374, in subsec. (j)(1), following "corporation", substituted "," for "or", and inserted ", or a fresh water supply district under Chapter 53, Water Code".

Acts 1999, 76th Leg., ch. 1375, rewrote subsec. (*l*), which previously read:

"The compensation provided under Subsection (g) shall be determined by a qualified individual or firm to serve as independent appraiser, who shall be selected by the affected retail public utility. The determination of compensation by the independent appraiser shall be binding on the commission. The costs of the independent appraiser shall be borne by the municipality."

Section 2 of Acts 1999, 76th Leg., ch. 1375 provides:

"The changes in law made by this Act apply only to an application filed with the Texas Natural Resource Conservation Commission to grant single certification to a municipality under Section 13.255(b), Water Code, that is filed on or after September 1, 1999. An application to grant single certification filed with the commission under that section before September 1, 1999, is governed by the law in effect immediately before the effective date of this Act, and the former law is continued in effect for that purpose."

Acts 2005, 79th Leg., ch. 1145 in subsec. (g), in the first sentence, inserted "owned and utilized by the retail public utility for its facilities" following "value of real property", and in the second sentence deleted "for the taking, damaging, and/or loss of personal property, including the retail public utility's business" following "compensation to a retail public utility", and substituted "lost from existing customers" for "and expenses of the retail public utility"; and added subsec. (g–1).

Section 15 of Acts 2005, 79th Leg., ch. 1145 provides:

"The changes in law made by this Act apply only to:

"(1) an application for a certificate of public convenience and necessity or for an amendment to a certificate of public convenience and necessity submitted to the Texas Commission on Environmental Quality on or after January 1, 2006; and

"(2) a proceeding to amend or revoke a certificate of public convenience and necessity initiated on or after January 1, 2006."

Cross References

Municipally owned or operated utility not to serve area within other district except as provided by this section, see V.T.C.A., Water Code § 13.247.

AGREEMENT FOR THE BULK
SALE AND PURCHASE OF WATER

THIS AGREEMENT is entered into this the 22nd day of October, 1992, by and between the CITY OF COLLEGE STATION, a Texas municipal corporation (hereinafter referred to as "CITY") and WELLBORN WATER SUPPLY CORPORATION, a Texas non-profit corporation, (hereinafter referred to as "WELLBORN"), where the CITY will provide water service to WELLBORN pursuant to the terms and conditions set forth herein.

WHEREAS, the CITY owns and operates a water distribution system with a capacity currently capable of serving the present customers of the city system and the estimated number of water users to be served by the city system in the future, and with additional capacity to meet traditional consumption demand by WELLBORN;

WHEREAS, by the authority of the City Council of the City of College Station, exercised by the passage of a resolution dated October 22, 1992, the sale of water is made to WELLBORN in accordance with the authorization of the City council and execution of this Agreement by the Mayor carrying out said authorization;

WHEREAS, WELLBORN is a non-profit corporation which installs and maintains certain water pipeline facilities in the extra-territorial jurisdiction of City;

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d/c/agreement/wellborn

WHEREAS, the water pipeline facilities are operated by WELLBORN and the facilities are utilized to supply water purchased from CITY; and

WHEREAS, by the authority of the board of WELLBORN enacted a resolution on the 15TH day of SEPTEMBER, 1992, the purchase of water from CITY in accordance with the terms set forth in the said resolution was approved and the execution of this Agreement was duly authorized;

NOW THEREFORE, in consideration of the promises and agreements herein contained the parties hereby agree as follows:

1. CITY will furnish to WELLBORN at the points of delivery during the term of this agreement potable treated water available to CITY from its existing supply sources.

2. CITY presently meters water to WELLBORN at the point or points known as the WELLBORN delivery points on Wellborn Road and on Greens Prairie Road or as designated by CITY from time to time. CITY shall meter water to WELLBORN. The "point of delivery" shall be the metering points for WELLBORN, so established from time to time by the CITY. WELLBORN shall control and maintain the lines downstream from the points of delivery as same may be established from time to time.

3. The parties understand and agree that as a part of the consideration for the execution of this Agreement WELLBORN agrees to allow CITY to provide the water service to any area annexed by CITY without separate charge. It is the intent of the parties that any prohibition of such transfer of water utility customers

CS00124

upon annexation by City shall result in the automatic termination of this Agreement.

4. At the points of delivery defined herein entitled to and responsibility for the water shall pass from CITY to WELLBORN.

5. Should CITY fail to supply water as a result of excessive upstream demand CITY shall respond to twenty-four hour call and shall utilize its best efforts to remedy such condition to restore flow to WELLBORN.

6. Should the CITY fail to supply water due to line loss, breakage, equipment malfunction or down time, CITY shall use reasonable care and diligence in restoring the flow to WELLBORN and all other users.

7. WELLBORN agrees that CITY'S capability to provide water under this Agreement is subject to the available supply and deliverability conditions that exist from time to time. In the event that CITY'S supply of water is insufficient to meet the needs of the customers of CITY, including WELLBORN, CITY will use its best efforts to supply water to WELLBORN for the essential uses of WELLBORN up to 1 million gallons per day or 30 million gallons per month, provided that such needs of customers within the city limits shall be met first. CITY shall provide water at a rate of flow not less than 1000 g.p.m. aggregate of all points of delivery.

8. In the event that CITY is unable to supply any or all of the demand requirements of WELLBORN, CITY will give notification by any reasonable means, including by writing; by telephone,

with follow-up written confirmation and acknowledgment; and by telegraph to WELLBORN's authorized representative at the address and telephone number provided herein, within a reasonable time of the discovery of the deficiency in the water supply; but, in no event less than forty-eight hours prior to commencement of the curtailment of deliveries, except where the inability of CITY to give such notice is due to force majeure.

9. Should at any time CITY fail, for any reason, to deliver water to WELLBORN in the quantities required to meet WELLBORN'S full requirement as provided in this contract, WELLBORN shall have the right to seek and obtain alternate sources of supply to the extent reasonably necessary to ensure adequate supplies to WELLBORN thereafter. In the event WELLBORN obtains alternate supplies, it will exercise reasonable care to prevent diminution of the existing quality of CITY'S water supply due to the connection of the alternate source. WELLBORN, upon obtaining an alternate supply, will notify CITY within a reasonable time prior to the actual connection of the alternate supply, to permit CITY to investigate any health and safety problems that could be caused to CITY'S water supply by connection of the alternate supply. If CITY identifies a health and safety problem to CITY'S water supply that would be caused by the connection of the alternate supply, CITY will have the right to require WELLBORN to install the necessary equipment to prevent any contamination of CITY'S water supply by the water from the alternate supply source. In the event WELLBORN does not install the equipment

required to prevent contamination as specified by CITY, CITY shall have the right to disconnect its service from WELLBORN.

It is understood and acknowledged that WELLBORN also purchases water from Texas A&M University, which fact shall have no bearing on this agreement other than the requirement of WELLBORN to install backflow prevention devices at all delivery points.

CITY shall not be liable in damages for damage to WELLBORN'S lines or water system resulting from the rate of flow or quantity of water delivered.

10. WELLBORN hereby agrees to hold the CITY harmless for any claims or damages arising as a result of the chemical or bacterial content of water provided.

11. WELLBORN agrees to hold the CITY harmless from any act or omission of any representative, agent, lessee, and/or invitee of WELLBORN and to hold the CITY harmless against any and all claims for damages, costs, or expenses that may result from the provision of water service by CITY under this Agreement. WELLBORN agrees to and shall indemnify and hold harmless CITY, its respective officers, agents and employees, from and against any and all claims, losses, damages, demands, causes of action, suits and liability of every kind, including all expenses of litigation, court costs, and attorney's fees and expenses, for injury to or death of any person, or for damage to any property, arising out of or in connection with this Agreement, regardless of whether such injuries, death or damages are caused in whole or in part by the negligence of CITY.

12. If WELLBORN becomes insolvent, commits any act of bankruptcy, makes a general assignment for the benefit of creditors, or becomes the subject of any proceeding commenced under any statute or law for the relief of debtors then this Agreement shall automatically terminate.

13. CITY shall not be responsible or liable for any disruption in service.

14. Upon notification to CITY of a disruption of service to WELLBORN, CITY shall use due diligence to restore service to WELLBORN within a reasonable time.

15. WELLBORN shall pay for water taken at the meter as set by City Ordinance, which rate shall be the same rate as charged to rate payers within the CITY.

16. Billing shall be rendered by the CITY on or about the 1st day of each month and payment shall be made not later than 30 days after the billing date of each month.

17. WELLBORN shall guarantee timely payment of bills for water consumption. In the event that WELLBORN fails to make timely payment of its bill for water as required by CITY policy, it shall be required on demand to post the deposit either by cash or assignment of certificate of deposit in a sum equaling eight weeks average consumption. WELLBORN may assign its contract upon the written consent of CITY, which consent by CITY shall not be unreasonably withheld. Upon the assignment of the contract WELLBORN's assignee shall post a deposit as a new customer, which deposit shall be either by cash or assignment of a certificate of deposit in a sum equaling eight weeks average consumption.

18. Failure of WELLBORN to make payment within thirty (30) days after the billing date, as provided, shall be deemed a late payment, and CITY shall be authorized to charge an administrative fee for late payments as provided by ordinance.

19. If WELLBORN fails to pay for water service and any interest due within five (5) days of the due date for the month for which the payment is delinquent, then CITY shall give WELLBORN written notice of such delinquency as provided herein. If payment is not received within five (5) days from the date of notice, CITY may terminate water service to WELLBORN.

20. CITY shall maintain, at its own expense, at the point of delivery the necessary metering equipment, including a meter house or pit, and the required devices of standard type for properly measuring the quantity of water delivered to the WELLBORN. It shall be the duty of CITY to accurately measure the deliveries and render bills to WELLBORN based upon such measurements. It shall be the duty of CITY to maintain the measuring devices so that the water delivered is accounted for accurately. It is agreed that any measurement that is within two percent (2%), plus or minus, of one hundred percent (100%) shall be deemed accurate. CITY shall test and calibrate such metering equipment whenever requested by WELLBORN at the expense of WELLBORN, provided that the CITY shall bear test expenses if the meter is inaccurate by ten percent (10%) or more. WELLBORN has the right to request that the measurement devices be tested in the presence of WELLBORN'S duly authorized representative; provided, however, such requests will be no more frequent than for testing once each

year. If WELLBORN disputes the test results, WELLBORN may require independent testing of the measuring device provided WELLBORN shall pay the cost of said testing service. If the measuring devices are found to be inaccurate, CITY shall pay the cost of said testing service. If, upon any test, any measuring device is found to be inaccurate, such equipment shall be adjusted immediately by CITY to measure accurately. If the meter is disclosed by a test to be inaccurate in excess of 10 percent (10%), it shall be corrected for the six (6) months previous for such test in accordance with the percentage of inaccuracy found by such test. If any meter fails to register for any period, the amount of water furnished during such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure but in no event shall that amount be less than the amount supplied in the responding period in the previous year. All metering points will be equipped with back flow prevention devices meeting American Water Works Association (AWWA) specifications and City of College Station standards. Said devices shall be tested by a licensed "tester" at least annually with results being made available to CITY beginning one (1) year after execution of this agreement. In the event the said device or devices are found to be faulty, WELLBORN shall make every effort to bring said device or devices into compliance immediately. Records of repairs shall be sent to CITY. Failure to do so shall cause CITY to discontinue service to WELLBORN upon delivery of 24 hour notice as provided in this agreement. All additional metering points as established from time to time by

CITY shall be equipped with a metering device, pit and back flow prevention device. All costs associated with the installation and construction of said metering point shall be borne by WELLBORN.

21. This contract shall be for a term of six (6) years, during which CITY shall have an obligation to supply the quantities of water contemplated by this agreement. Upon the sixth anniversary date of this agreement and if no notice of termination has been given by either party, this agreement shall automatically renew and shall continue in full effect until termination notice is given by either party. Upon notice of termination by either party, CITY will continue water service for WELLBORN for three (3) years from the date of such notice. All provisions of the agreement will remain in full effect during the aforementioned three (3) years. Notice of termination may not be given by either party prior to the third anniversary date of the execution of this agreement. After said anniversary, notice of termination may be given thereafter at any time.

All notices and payments shall be sent and provided to the parties at the addresses and telephone numbers listed below:

WELLBORN Corporation
General Manager
P.O. Box 250
Wellborn, Texas 77881
(409) 690-9799

City of College Station
Attn: Asst. City Manager/
Director of Public Utilities
P.O. Box 9960
College Station, Texas 77840
(409) 764-3510

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The parties may change addresses for billing and payment upon thirty (30) days' written notice sent certified mail, return receipt requested. Any other notices provided or required in this Agreement, except for change of address for billings and payments, may be provided by written notice or other means as provided in this Agreement.

22. The parties signing this Agreement shall provide adequate proof of their authority to execute this Agreement. This Agreement shall inure to the benefit and be binding upon the parties hereto and their respective successors or assigns, but shall not be assignable by either party without the written consent of the other party.

23. In interpreting the various provisions of this Agreement in any court of law, it is the intention of the parties to this Agreement that any court having jurisdiction shall apply the laws of the State of Texas to interpret the terms and provisions.

24. The parties, by their signatures, say they have read and understand the contents of this Agreement, that they acknowledge and agree that it contains the entire agreement between the parties with respect to the subject matter and supersedes any and all prior communications, agreements, or understandings.

WELLBORN CORPORATION

BY: _____
Representative

CITY OF COLLEGE STATION

BY: _____
Larry Ringer, Mayor

ATTEST: Connie Hooks
Connie Hooks, City Secretary

CS00132

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d/c/agreement/wellborn

STATE OF TEXAS)
)
COUNTY OF BRAZOS)

ACKNOWLEDGMENT

This instrument was acknowledged before me on the 14 day of OCTOBER, 1992, by LYNN ELLIOTT of WELLBORN CORPORATION a Texas non-profit corporation on behalf of said corporation.

MICHAEL H. HENSARLING
MY COMMISSION EXPIRES
November 17, 1993

Michael H. Hensarling
Notary Public in and for
The State of Texas

STATE OF TEXAS)
)
COUNTY OF BRAZOS)

ACKNOWLEDGMENT

This instrument was acknowledged before me on the 10th day of November, 1992, by Larry Ringer as Mayor of the City of College Station, a Texas Municipal Corporation, on behalf of said corporation.

DEBRA S. CHARANZA
MY COMMISSION EXPIRES
June 5, 1994

Debra S. Charanza
Notary Public in and for
The State of Texas

CS00133

AGREEMENT TO TRANSFER WATER SERVICE AREA FROM WELLBORN WATER SUPPLY CORPORATION TO THE CITY OF COLLEGE STATION, TEXAS

COPY

WHEREAS, College Station (hereinafter CITY) annexed area into its municipal boundaries that was certificated to Wellborn Water Supply Corporation (hereinafter WWSC); and

WHEREAS, both WWSC and CITY have filed applications with the Texas Natural Resource Conservation Commission (hereinafter TNRCC) to transfer the area annexed by College Station from WWSC to CITY; and

WHEREAS, both WWSC and CITY have reviewed the other entity's application and maps that on file with the TNRCC and agree that said documents are accurate reflect and depict the transfer of service area;

NOW, THEREFOR, for and in consideration of the premises and mutual covenants and promises hereinafter set forth, the Parties represent and agree as follows:

1. WWSC agrees to transfer all of the water service area depicted on the map attached hereto as Exhibit A and incorporated herewith to CITY. Exhibit A is a copy of the map filed with and accepted by the TNRCC in CCN Application No. 31495-C;

2. CITY and WWSC agree that WWSC shall continue to provide water service to customers in these areas until such time that CITY constructs facilities and connects said customers to its water supply.

3. The transfer of service area includes all of the geographic territory depicted in Exhibit A as well as all of the customers contained therein at the time that CITY transfers customers on to CITY's system.

4. The parties have agreed on the consideration for this transfer pursuant to Paragraph 3 of the agreement executed by and between the parties on October 22, 1992.

5. The parties have agreed that the agreement executed by and between the parties on October 22, 1992, may be transferred and assigned to the Wellborn Water Special Utility District, after creation of said District.

6. **Invalidity.** If any provision of this Agreement shall be held to be invalid, illegal or unenforceable by a court or other tribunal of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. The parties shall use their best efforts to replace the respective provision or provisions of this Agreement with legal terms and conditions approximating the original intent of the parties.

7. **Written Notice.** Unless otherwise specified, written notice shall be deemed to have been duly served if delivered in person to the individual or to a member of the firm or to any officer of the corporation for whom it is intended or if it is delivered or sent certified mail to the last business address as listed herein. Each party will have the right to change its business address by at least thirty (30) calendar days written notice to the other parties in writing of such change.

8. **Entire Agreement.** It is understood that this Agreement contains the entire agreement between the parties and supersedes any and all prior agreements, arrangements, or understandings between the parties relating to the subject matter. No oral understandings, statements, promises or inducements contrary to the terms of this Agreement exist. This Agreement cannot be changed or terminated orally. No verbal agreement or conversation with any officer, agent or employee of the City, either before or after the execution of this Agreement, shall affect or modify any of the terms or obligations hereunder.

9. **Amendment.** No amendment to this Agreement shall be effective and binding unless and until it is reduced to writing and signed by duly authorized representatives of both parties.

10. **Authority to Contract.** Each party has the full power and authority to enter into and perform this Agreement, and the person signing this Agreement on behalf of each party has been properly authorized and empowered to enter into this Agreement. The persons executing this Agreement hereby represent that they have authorization to sign on behalf of their respective corporations.

11. **Waiver.** Failure of any party, at any time, to enforce a provision of this Agreement shall in no way constitute a waiver of that provision nor in any way affect the validity of this Agreement, any part hereof, or the right of the City thereafter to enforce each and every provision hereof. No term of this Agreement shall be deemed waived or breach excused unless the waiver shall be in writing and signed by the party claimed to have waived. Furthermore, any consent to or waiver of a breach will not constitute consent to or waiver of or excuse of any other different or subsequent breach.

12. **Agreement Read.** The parties acknowledge that they have read, understand and intend to be bound by the terms and conditions of this Agreement.

13. **Multiple Originals.** It is understood and agreed that this Agreement may be executed in a number of identical counterparts, each of which shall be deemed an original for all purposes.

WELLBORN WATER SUPPLY CORP.

By: _____
Lynn Elliott, President

CITY OF COLLEGE STATION

By: _____
Lynn McIlhaney, Mayor

ATTEST:

By: _____
Connie Hooks, City Secretary

APPROVED:

_____
George K. Noe, City Manager

STATE OF TEXAS §
§ ACKNOWLEDGMENT
COUNTY OF BRAZOS §

This instrument was acknowledged before me on the 9th day of July, 1997, by Lynn Elliott, in his capacity as President of Wellborn Water Supply Corp., a Texas corporation on behalf of said CORPORATION.

LAURA S. LILES
Notary Public, State of Texas
My Commission Expires
SEPTEMBER 29 1999

Laura S. Liles
Notary Public in and for
the State of Texas

STATE OF TEXAS §
§ ACKNOWLEDGMENT
COUNTY OF BRAZOS §

This instrument was acknowledged before me on the 14th day of July, 1997, by Lynn McIlhaney in her capacity as Mayor of the City of College Station, a Texas home-rule municipality, on behalf of said municipality.

KATHERINE M. STASNY
Notary Public, State of Texas
My Commission Expires
JULY 10, 2000

Katherine M. Stasny
Notary Public in and for
the State of Texas

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7/3/97

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

STATE OF TEXAS
COUNTY OF TRAVIS
I hereby certify that this is a true and correct copy of a Texas Natural Resource Conservation Commission document, which is filed in the permanent records of the Commission.
Given under my hand and the seal of office on MAR 16 1998
Eugenia K. Brumm
Eugenia K. Brumm, Chief Clerk
Texas Natural Resource Conservation Commission

DOCKET NO. 97-1133-DIS

AN ORDER GRANTING A REQUEST FOR CONVERSION TO AND CREATION OF WELLBORN SPECIAL UTILITY DISTRICT OF BRAZOS COUNTY; APPOINTING TEMPORARY DIRECTORS; AUTHORIZATION TO TRANSFER CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 11340; AND AUTHORIZATION TO IMPOSE AN IMPACT FEE

On March 4, 1998, the Texas Natural Resource Conservation Commission (the "Commission") met in regular session at its offices in Austin, Texas, notice of the meeting having been distributed in compliance with the Open Meetings Act, TEX. GOV'T CODE ANN. Title 5, Chapter 551 (Vernon 1994 & Supp. 1998) and the Administrative Procedure Act, TEX. GOV'T CODE ANN. Title 10, Chapter 2001 (Vernon Pamph. 1998), to consider a petition from Wellborn Water Supply Corporation (the "WSC") requesting conversion to Wellborn Special Utility District of Brazos County (the "District") and authorization to impose a $950 impact fee per connection on new development for water supply facilities.

After considering all the arguments presented at agenda, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On August 12, 1996, a petition requesting the conversion of Wellborn Water Supply Corporation to Wellborn Special Utility District of Brazos County and authorization to impose a $950 impact fee per connection on new development for water supply facilities was filed with the Commission.

2. Proper notice of the application on this petition was given by publishing a copy thereof on January 13, 1998, and January 20, 1998, in the Eagle, a newspaper regularly published and generally circulated in Brazos County, Texas, a county in which the proposed District is to be located.

3. All customers and other affected parties in the proposed District were notified by mail of the hearing on the petition.

4. The appropriate and necessary deposits and fees associated with the filing of the petition have been paid to the Commission.

5. The resolution dated December 19, 1995, was adopted by the WSC as required by TEX. WATER CODE ANN. §65.014 (Vernon 1988). In accordance with TEX. WATER CODE ANN. §65.015 (Vernon 1988), the resolution requested that the following persons be considered for the initial board of directors:

Lynn Elliott
Jacque Atkins
Mary Herron
A.P. Boyd
David Mayo
Gary Spence
Charles Robertson
Theresa Schehin
Fain McDougal

6. Each of the persons named in Finding of Fact No. 5 is qualified to serve as a temporary director of the proposed District as each (1) is over the age of 18 years, (2) is a resident of the State of Texas, (3) either owns land subject to taxation within the proposed District, is a user of the facilities of the proposed District, or is a qualified voter of the proposed District, and (4) has completed and filed with the Commission an application for consideration of appointment as temporary director in the form and substance required by the Rules of the Commission.

7. The entire proposed District is generally bounded by the Brazos River on the west; by FM 2154 and State Highway 6 on the south; by areas along Carters Creek and Lick Creek on the east; and by the City of College Station on the north.

8. The boundary description of the proposed District has been examined by Commission staff and found to form an acceptable boundary for the proposed District.

9. The boundaries of the District should reflect the current CCN No. 11340 boundary.

10. The resolution adopted by the WSC dated December 19, 1995, requesting conversion to and creation of the District conforms to the requirements of TEX. WATER CODE ANN. §65.015 (Vernon 1988).

11. The request for conversion to and creation of the District is feasible and practicable and is necessary and will be a benefit to the land included in the District.

12. The proposed District and its system and subsequent development within the District will not have an unreasonable effect on the following: topography, floodplain, land elevations, subsidence, groundwater levels, recharge capabilities of a groundwater source, natural runoff rates and drainage, and water quality.

13. The District's request to impose an impact fee of $950 per connection on new development is reasonable, equitable and necessary as a mechanism to finance improvements to serve the designated service area.

CONCLUSIONS OF LAW

1. The public hearing regarding the petition was held under the authority of and in accordance with TEX. WATER CODE ANN., Chapter 65 and the applicable provisions of the Texas Natural Resource Conservation Commission Permanent Rules.

2. The Commission has jurisdiction to consider this petition and is authorized to make and enter its Findings of Fact, Conclusions of Law, and Orders with respect to the request for conversion of the WSC to and creation of the District.

3. All of the land and property proposed may properly be included within the District.

4. All statutory and regulatory requirements for conversion of Wellborn Water Supply Corporation to Wellborn Special Utility District of Brazos County, have been fulfilled, in accordance with TEX. WATER CODE ANN., Chapter 65 and Title 30 TAC Section 293.11.

5. All statutory and regulatory requirements for Wellborn Special Utility District of Brazos County to impose an impact fee, have been fulfilled, in accordance with TEX. LOC. GOV'T CODE ANN. §395.080 (Vernon Supp. 1998).

NOW THEREFORE, BE IT ORDERED BY THE TEXAS NATURAL RESOURCE CONSERVATION COMMISSION THAT:

1. The petition for the conversion of Wellborn Water Supply Corporation to Wellborn Special Utility District of Brazos County is hereby granted.

2. The District is created under the terms and conditions of Article XVI, Section 59 of the Texas Constitution and TEX. WATER CODE ANN., Chapter 65.

3. The District shall have all of the rights, powers, privileges, authority, and functions conferred and shall be subject to all duties imposed by the Texas Natural Resource Conservation Commission and the general laws of the State of Texas relating to special utility districts.

4. The boundaries of the District shall reflect the current Certificate of Convenience and Necessity No. 11340 boundary.

5. The following persons are hereby named and appointed as temporary directors of the District, to serve until their successors are elected or have been appointed in accordance with applicable law:

Lynn Elliott
Jacque Atkins
Mary Herron
A.P. Boyd
David Mayo
Gary Spence
Charles Robertson
Theresa Schehin
Fain McDougal

6. The foregoing temporary directors shall, as soon as practicable after the date of entry of this Order, execute their official bonds and take their official oath of office. All such bonds shall be approved by the Board of Directors of the District and each bond and oath shall be filed with the District and retained in its records.

7. The District's Board of Directors is directed to send to the Commission's District Administration Section an order canvassing the confirmation election returns within thirty (30) days of the board meeting at which such returns are canvassed.

8. Upon a successful confirmation election, assets and debts of the WSC are to be transferred to the District as expeditiously as practicable and dissolution proceedings of the WSC are to be commenced immediately after such transfer.

9. Certificate of Convenience and Necessity No. 11340 will be issued by the Commission in the name of Wellborn Special Utility District of Brazos County, contingent upon a successful confirmation election, and Commission receipt of evidence that the WSC has been dissolved, in order to ensure continued service for all customers currently served by the WSC.

10. This Order shall in no event be construed as an approval of any proposed agreements or of any particular items in any documents provided in support of the conversion petition, nor as a commitment or requirement of the Commission in the future to approve or disapprove any particular items or agreements in future applications submitted by the District for Commission consideration.

11. The District is authorized to impose an impact fee of $950 per connection on new development for water supply facilities.

12. The District is advised that any increase in the amount of the approved impact fee will require Commission approval.

13. The District is advised that all funds collected through the impact fee assessment shall be deposited in interest-bearing accounts, which combined shall be utilized for construction and/or capacity purchase of improvements; and the records of the account(s) into which impact fee revenue is deposited shall be open for public inspection and copying during normal business hours.

14. The Chief Clerk of the Commission shall forward a copy of this Order to all affected persons.

15. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Issued Date: MAR 11 1998

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Barry R. McBee, Chairman

RESOLUTION TRANSFERRING ASSETS AND DEBTS
OF WELLBORN WATER SUPPLY CORPORATION
TO WELLBORN SPECIAL UTILITY DISTRICT

WHEREAS, on the 2nd day of May, 1998, an election was held to create the Wellborn Water Special Utility District, and

WHEREAS, at said election, a majority of the voters elected to convert to a Special Utility District, and

WHEREAS, the Wellborn Water Supply Corporation desires to transfer all of its assets and debts to the Wellborn Special Utility District, NOW THEREFORE

IT IS HEREBY RESOLVED BY THE BOARD OF DIRECTORS OF THE WELLBORN WATER SUPPLY CORPORATION THAT:

I.

All assets and debts of the Wellborn Water Supply Corporation are hereby transferred to the Wellborn Special Utility District.

PASSES AND APPROVED this 5th day of May, 1998, by the Board of Directors of the Wellborn Water Supply Corporation.

WELLBORN WATER SUPPLY CORPORATION

By: _____
President

ATTEST:

_____
Secretary

I certify this is a true and correct copy.

_____
Pat Batchelor

ORDER CANVASSING RETURNS
OF MAY 2, 1998 ELECTION; DECLARING
RESULTS OF SAID ELECTION AND CREATING
WELLBORN SPECIAL UTILITY DISTRICT AND
APPOINTING DIRECTORS OF SAID DISTRICT

WHEREAS, on May 2, 1998, the Board of Directors of the Wellborn Water Supply Corporation conducted an election to convert to a Special Utility District and to elect directors to said District, and

WHEREAS, said election was held in accordance with the Texas Election Code, including the posting and publication of proper notices, and

WHEREAS, said election returns have been presented to and have been canvassed by the Board of Directors of Wellborn Water Supply Corporation, NOW THEREFORE

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF SAID CORPORATION THAT:

I.

The total number of votes cast at said election as 90.

II.

On the question of whether or not to create the Wellborn Special Utility District, the votes were as follows:

FOR CREATION	84
AGAINST CREATION	6
BLANK, DEFECTIVE AND UNCOUNTED BALLOTS	

III.

On the question of electing Temporary Directors for the Special Utility District, the following people received the following votes:

	FOR	AGAINST
Hugh Lindsay	70	
Jacque Atkins	64	
Gary Spence	65	
Mary Herron	74	
A. P. Boyd	71	
Hank Bohne	74	
Charles Robertson	71	
Theresa Schehin	71	
Fain McDougal	61	

IV.

It is hereby found, determined and declared of record that the issue of conversion to a Special Utility District and the election of Temporary Directors received the approval of a majority of the electors voting at said election, and therefore, the Wellborn Special Utility District is hereby created. Additionally, the above-listed Temporary Directors are hereby declared to be the initial Directors of said District.

PASSED AND APPROVED this 5th day of May, 1998, by the Board of Directors of Wellborn Water Supply Corporation.

WELLBORN WATER SUPPLY CORPORATION

By _____
President

ATTEST:

_____
Secretary

I certify that this is a true and correct copy.

Bet Batchelor
Bet Batchelor

WELLBORN SPECIAL UTILITY DISTRICT

CERTIFIED MAIL NO. Z 357 427 624
RETURN RECEIPT REQUESTED

January 21, 2000

City of College Station
Attention: Asst. City Manager/Director of Public Works
P. O. Box 9960
College Station, Texas 77842

Re: Notice of Termination of Agreement
For the Bulk Sale and Purchase of Water
Three Years from Date: January 21, 2003

Dear Sir or Madam:

Pursuant to the terms of the current contract for the sale and purchase of water by and between The City of College Station and Wellborn Water Supply Corporation (now Wellborn Special Utility District) dated October 22, 1992, notice of termination is hereby provided for the contract to end effective January 21, 2003, being three years from the date of this notice. All provisions of the agreement will remain in full effect during the remaining three years.

The Board of Directors of Wellborn Special Utility District, while not waiving its right to deny and defend against such interpretation, has determined that the provisions of Paragraph 3 of the current contract may be construed in a very harmful way that would place the District in economic jeopardy, threaten its ability to carry out its mission as a rural water distribution system, and cause it to be in violation of federal rules arising out of its debt position. As you can see, the contract did not receive approval from the controlling federal agency at the time.

While the District may have federal laws to assist in protecting its service area in certain instances, the problem does not lie so much with the City's need to expand and annex new municipal area that is currently being served by the District; the problem arises over the possible interpretation by the City that it owes the district nothing when it elects to take such service area. It would not be appropriate to continue with that as a possible outcome. Such result would run contrary to all the legislative enactments and provisions that are aimed at just and adequate compensation.

P.O. Box 250 • 4118 Greens Prairie Rd. • Wellborn, TX 77881 • Phone (409) 690-9799 • Fax (409) 690-1260

Only a few of the current board members, council members, managers or directors were in place or involved in formulating the current contract. Our hope is that current parties can work to replace this contract or amend the potentially harmful language in the days and months ahead.

Wellborn Special Utility District stands ready to work with the staff of the City to incorporate more favorable provisions in keeping with Section 13.255 of the Water Code.

Sincerely,

WELLBORN SPECIAL UTILITY DISTRICT
OF BRAZOS COUNTY

BY: Mary G Henson
President

xc: Honorable Mayor Lynn McIlhaney

Members of the Council:
James Massey
Ron Silvia
Winnie Garner
Larry Marriott
Dennis Maloney
Anne Hazen

Mr. Tom Brymer
City Manager

Mr. Harvey Cargill
City Attorney

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER denying the request of Wellborn Special Utility District for a TEX. WATER CODE § 13.252 cease and desist order against the City of College Station; TCEQ Docket No. 2003-1518-UCR; SOAH Docket No. 582-04-2840.

On March 9, 2005, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the request of Wellborn Special Utility District (Wellborn) for a cease and desist order against the City of College Station (College Station) pursuant to TEX. WATER CODE § 13.252. Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision which recommended that the Commission grant College Station's Motion for Summary Disposition and dismiss Wellborn's request for a cease and desist order.

FINDINGS OF FACT

1. On September 11, 2003, Wellborn Special Utility District (Wellborn) filed its Original Petition with the Texas Commission on Environmental Quality (TCEQ or Commission), requesting a Cease and Desist Order against the City of College Station (College Station) pursuant to TEX. WATER CODE § 13.252. Wellborn alleged that the City was illegally interfering with its retail water Certificate of Convenience and Necessity (CCN) certificated area.

2. Wellborn filed a First Amended Petition on March 14, 2004, and a Second Amended Petition on September 10, 2004. The amended petitions requested the same relief under § 13.252 but revised some factual allegations.

9. City of College Station is a home-rule city.

10. City of College Station holds retail water CCN No. 10169.

11. On October 24, 2002, City of College Station passed and approved Ordinance No. 2590, by which the City annexed certain lands within the service area of Wellborn Special Utility District.

12. City of College Station has not constructed a line, plant, or system that extends into Wellborn Special Utility District's CCN area.

13. City of College Station has not furnished, made available, or rendered retail water service to any portion of Wellborn Special Utility District's CCN area annexed by College Station under Ordinance No. 2590.

14. On or before May 2003, City of College Station issued a request for qualifications to obtain consulting services to design and plan for municipal services within the Wellborn Special Utility District service area.

15. City of College Station plans to offer retail water service in the future to the portion of Wellborn Special Utility District's CCN area annexed by the City under Ordinance No. 2590.

16. In 1992, Wellborn Water Supply Corporation and the City of College Station entered into an agreement entitled "Agreement for Bulk Sale and Purchase of Water" (1992 Agreement).

17. Paragraph 3 of the 1992 Agreement provides: "The parties understand and agree that as a part of the consideration for the execution of this Agreement WELLBORN agrees to allow the CITY to provide the water service to any area annexed by CITY without separate charge. It is the intent of the parties that any prohibition of such transfer of water utility customers upon annexation by City shall result in the automatic termination of this Agreement."

CONCLUSIONS OF LAW

1. If a retail public utility furnishes, makes available, renders, or extends retail water utility service to any portion of the service area of another retail public utility that has been granted a CCN, the commission may issue an order prohibiting the construction, extension, or provision of service or prescribing terms and conditions for the provision of the service. TEX. WATER CODE § 13.252.

2. Based on the above Findings of Fact and Conclusions of Law, the Commission has jurisdiction to consider and rule on Wellborn Special Utility District's complaint against the City of College Station.

3. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. (Gov't Code) ch. 2003 (West 2000).

4. The Commission will grant a summary disposition of a case if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the summary disposition hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion. 80 TEX. ADMIN. CODE § 137(c).

5. The actions taken by City of College Station to plan for water service within its newly annexed areas that are within Wellborn Special Utility District's CCN area are preliminary actions that do not support a cease-and-desist order under TEX. WATER CODE § 13.252.

6. Insufficient basis exists to issue a cease-and-desist order against City of College Station under TEX. WATER CODE § 13.252.

6. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code §2001.144.

Issue Date: MAR 11 2005

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman

Westlaw.
Not Reported in S.W.3d
Not Reported in S.W.3d, 2006 WL 2067887 (Tex.App.-Waco)
(Cite as: Not Reported in S.W.3d, 2006 WL 2067887 (Tex.App.-Waco))

H

City of **CollegeStation** v. **Wellborn** Special Utility Dist.
Tex.App.-Waco,2006.
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,Waco.

The CITY OF **COLLEGESTATION**, Texas, Appellant

v.

The **WELLBORN** SPECIAL UTILITY DISTRICT, Appellee.

No. 10-04-00306-CV.

July 26, 2006.
Rehearing Overruled Aug. 29, 2006.

From the 85th District Court, Brazos County, Texas, Trial Court No. 03-002098-CV-85,J.D. Langley J.

C. Robert Heath, Charles R. Kimbrough, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P., Austin, Harvey Cargill, Jr., City Attorney, The City of **CollegeStation** , **CollegeStation**, for Appellant/Relator.
Philip Dale Mockford and Leonard H. Dougal, Jackson Walker L.L.P., Austin, for Appellee/Respondent.
Jose Vela, Asst. United States Attorney, Houston, for Others.

Before Chief Justice GRAY, Justice VANCE, and Justice REYNA.

MEMORANDUM OPINION

TOM GRAY, Chief Justice.
***1** The City of **CollegeStation** annexed land within **Wellborn** Special Utility District's area to provide retail water services. Pursuant to an agreement made ten years earlier, the City began attempts to provide retail water services to the newly annexed area. **Wellborn** filed an application for a cease and desist order from the Texas Commission on Environmental Quality. While that application was pending, the City filed a lawsuit against **Wellborn**. **Wellborn** filed a plea to the jurisdiction which, after a hearing, was granted. The City appeals. Because the Commission has exclusive jurisdiction over the claims pled in the City's lawsuit, we affirm the trial court's judgment granting **Wellborn's** plea to the jurisdiction.

The City raised six claims in its lawsuit against **Wellborn**. **Wellborn** filed a plea to the jurisdiction alleging that the Commission had exclusive, original jurisdiction of the City's claims and that the suit was barred by sovereign immunity. The trial court granted the plea to the jurisdiction without stating upon which of **Wellborn's** arguments it was relying.

If an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking judicial review. *Subaru of America, Inc. v. David McDavid Nissan, Inc.,* 84 S.W.3d 212, 221 (Tex.2002). Until then, a trial court lacks subject matter jurisdiction. *Id.* Whether an agency has exclusive jurisdiction is a question of law we review *de novo, Id.* at 222.

There is no question that under Chapter 13 of the Water Code, the Commission has exclusive, original jurisdiction over water and sewer utility rates, operations, and services as provided by that chapter. TEX. WATER CODE ANN. § 13.042(e) (Vernon 2000). The question becomes whether the City's claims fall into these categories of rates, operations, and services.

Chapter 13's primary purpose is to "establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and

reasonable to the consumers and to the retail public utilities."*Id.* § 13.001(c). To accomplish that purpose, the Code requires a retail public utility to obtain a certificate of public convenience and necessity from the Commission before providing retail water or sewer utility service to an area and provides a way for the certificate to be revoked or amended. TEX. WATER CODE ANN. §§ 13.242(a), 13.254 (Vernon Supp.2005). And, even when an area that is already being provided retail water or sewer utility by a retail public utility is annexed by a municipality, the municipality may not provide water or sewer service to the annexed area without a certificate. *Id.* § 13.247(a). The Code further provides the manner in which a municipality may acquire a certificate of an annexed area that is being provided water or sewer utility by another entity. *Id.* § 13.255. Moreover, any agreement or contract between retail public utilities designating areas to be served can be valid and enforceable and incorporated into a certificate if approved by the Commission. TEX. WATER CODE ANN. §§ 13.248, 13.255(a) (Vernon 2000 & Supp.2005).

***2** The Code also provides that any party to a proceeding before the Commission is entitled to judicial review under the substantial evidence rule.TEX. WATER CODE ANN. § 13.381 (Vernon 2000). And any party that is aggrieved by a final order pertaining to certification in an annexed area may appeal to the district court of Travis County. *Id.*§ 13.255(e) (Vernon Supp.2005). The Commission may assess administrative penalties, issue "cease and desist" orders, issue injunctions and bring suit for the failure to follow its orders. *Id.* §§ 13.4151, 13.252, 13.411, 13.414 (Vernon 2000).

The City's claims of breach of contract, promissory estoppel, specific performance, and requests for a declaratory judgment, an injunction, and attorneys' fees are all predicated on a determination that **Wellborn** allow the City to provide water utility service to the newly annexed area within **Wellborn's** service area. That is a determination of a service that can only be made by the Commission. *See*TEX. WATER CODE ANN. §§ 13.042(e), 13.242(a), 13.255 (Vernon 2000 & Supp.2005). In other words, the Commission has exclusive, original jurisdiction over that question, and the City must exhaust its administrative remedies before filing suit.

Therefore, the trial court did not err in granting **Wellborn's** plea to the jurisdiction on the argument that the Commission had exclusive, original jurisdiction of the City's claims. Because the trial court's judgment is supported by evidence regarding one argument raised by **Wellborn** in its plea, we need not determine whether the trial court was correct in granting the plea on any other argument raised by **Wellborn**. *See e.g. Western Invs., Inc. v. Urena,* 162 S.W.3d 547, 550 (Tex.2005); *see also Britton v. Tex. Dep't of Crim. Justice,* 95 S.W.3d 676, 681-82 (Tex.App.-Houston [1st Dist.] 2002, no pet.).

The trial court's judgment is affirmed.

Justice Vance dissents from the judgment with a note.[FN*]

> FN* (Note by Justice Vance: "I agree with the City of **CollegeStation** that the City's claims include common law causes of action over which the trial court has jurisdiction. *See BCY Water Supply corp. v. Residential Inv., Inc.,* 170 S.W.3d 596, 601 (Tex.App.-Tyler 2005, pet. denied). Because the trial court has jurisdiction over the City's common law claims, the plea to the jurisdiction should have been denied. *See Aledo I.S.D. v. Choctaw Properties, LLC,* 17 S.W.3d 260, 262 (Tex.App.-Waco 2000, no pet.)("If the district court has jurisdiction of any claim as alleged in a reasonable interpretation of the plaintiff's petition, then the trial court has jurisdiction of that claim and over that particular defendant....). I note that while this appeal has been pending the TCEQ dismissed an administrative action filed by **Wellborn** SUD which asserted the 1992 contract as a basis

> for relief. TEX. COMM'N ENVIRONMENTAL QUALITY,*Request of* ***Wellborn*** *Special Utility District for a*Tex. Water Code § 13.252 Cease and Desist Order against the City of **CollegeStation**, Docket No. 2003-1518-UCR, SOAH Docket No. 582-04-2840 (March 15, 2005) (Final Order Denying Request).")

Tex.App.-Waco,2006.
City of College Station v. Wellborn Special Utility Dist.
Not Reported in S.W.3d, 2006 WL 2067887 (Tex.App.-Waco)

END OF DOCUMENT

SOAH DOCKET NO. 582-08-0990
TCEQ DOCKET NO. 2007-1833-UCR

APPLICATION OF CITY OF COLLEGE STATION TO DECERTIFY A PORTION OF CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 11340 OF WELLBORN SPECIAL UTILITY DISTRICT IN BRAZOS COUNTY, TEXAS, (APPLICATION NO. 35717-C)	§	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

WELLBORN SPECIAL UTILITY DISTRICT'S
PLEA TO THE JURISDICTION AND FIRST AMENDED ANSWER

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, Wellborn Special Utility District ("Wellborn") and files this Plea to the Jurisdiction and Original Answer to the City of College Station's Application to Amend a Water Certificate of Convenience and Necessity Under Water Code Section 13.255 ("Application"), and in support states as follows:

I.
PLEA TO THE JURISDICTION

1. Wellborn is a political subdivision of the State created under and subject to the authority of Tex. Const. art. XVI, Section 59. Tex. Water Code § 65.011; *Clear Lake City Water Auth. v. Clear Lake Utilities Co.*, 549 S.W.2d 385 (Tex. 1977). As a political subdivision of the State, Wellborn is afforded sovereign immunity. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006); *General Services Commission v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001). A plaintiff who sues the State or a political subdivision must establish the State's consent to suit in order to establish the trial court's subject matter jurisdiction over the dispute. *Texas Dept. of Transportation v. Jones*, 8 S.W.3d 636 (Tex. 1999). The Legislature has not consented

to the bringing of this action against Wellborn. Absent such consent, no court or agency has jurisdiction over the state law issues presented in this action and this action should be dismissed.

2. Wellborn's immunity from suit as to these matters was previously litigated and affirmed by the Final Order of Dismissal (the "State Court Final Order") entered on October 4, 2004 in the cause styled *The City of College Station, Texas v. The Wellborn Special Utility District*, in the District Court of Brazos County, 85th Judicial District. Pursuant to the doctrines of res judicata and collateral estoppel, the City is bound by the terms of the State Court Final Order, and may not re-litigate the issue of Wellborn's immunity in this forum.

II.
FIRST AMENDED ANSWER

3. Wellborn generally denies each and every, all and singular, the allegations made by the City of College Station in its Application and demands strict proof thereof.

4. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because no agreement exists between Wellborn and the City sufficient to support an action under section 13.255(a) of the Texas Water Code.

5. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because the Agreement for the Bulk Sale and Purchase of Water ("1992 Water Purchase Agreement") relied upon by the City in its Application expired prior to the date the City filed its Application with the Texas Commission on Environmental Quality ("TCEQ").

6. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because Wellborn was not a party to the 1992 Water Purchase Agreement relied upon by the City in its Application.

7. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because Wellborn is not bound by the acts of the board of directors of its predecessor.

8. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because the contract relied upon by the City is invalid and unenforceable because it was not approved by the TCEQ or any of its predecessor agencies as required by section 13.248 of the Texas Water Code.

9. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because even if the 1992 Water Purchase Agreement were sufficient to bind Wellborn and if sufficient to constitute a section 13.255(a) agreement under the Texas Water Code, the agreement between the parties to the 1992 Water Purchase Agreement does not allow for an involuntary transfer of CCN areas.

10. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because Wellborn is the obligee on loans issued by the United States Department of Agriculture – Farmers Home Administration (the "FmHA") in accordance with the provisions of 7 U.S.C. § 1926(a). The City is seeking by its Application to provide retail water utility service to customers and customer locations in territory annexed by the City within the Wellborn CCN, thereby diminishing the size of Wellborn's service area and the number of potential customers served by Wellborn. Pursuant to 7 U.S.C. § 1926(b), a municipal corporation or other public body may not curtail or limit Wellborn's delivery of retail water service within the geographic area served by Wellborn, including any area where Wellborn has made water service available. FmHA has not consented to the City providing retail water

service to the area set forth in the Application, and 7 U.S.C. § 1926(b) acts as a prohibition against such service by the City.

11. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied because, by virtue of its conduct, the City has waived the right to assert its claims.

12. For further answer, if further answer is necessary, Wellborn affirmatively pleads that the City's Application should be denied in whole or in part because the 1992 Water Purchase Agreement fails for lack of consideration.

13. Wellborn affirmatively pleads that the City's Application should be denied in whole or in part because its claims are barred by the Statute of Frauds and the parol evidence rule.

14. Wellborn reserves the right to amend or supplement this Answer and to add additional defenses as needed throughout these proceedings.

III.

WHEREFORE, PREMISES CONSIDERED, Wellborn Special Utility District respectfully prays that the City take nothing by its allegations, that the Application be denied, and that Wellborn be awarded such other and further relief to which it may be justly entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
512-236-2000
Fax No. 512-236-2002

By: _____
Leonard H. Dougal - 06031400
Philip D. Mockford – 14244100

ATTORNEYS FOR WELLBORN SPECIAL UTILITY DISTRICT

CERTIFICATE OF SERVICE

This is to certify that on this 25th day of April, 2008, a true and correct copy of the foregoing document was served on the following parties via hand-delivery in open court, or via facsimile.

Ms. LaDonna Castañuela (MC-105)
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F
Austin, Texas 78753

Honorable Roy Scudday
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701

Mr. Brian MacLeod (MC-173)
Texas Commission on Environmental Quality
Legal Division
12100 Park 35 Circle, Building A
Austin, Texas 78753

Mr. Bill Dugat
Bickerstaff, Heath, Smiley, Pollan,
Kever & McDaniel, LLP
816 Congress Avenue, Suite 1700
Austin, Texas 78701

Mr. Blas Coy (MC-103)
Office of Public Interest Council
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F
Austin, Texas 78753

Leonard H. Dougal